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No. 96-1570

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NYNEX CORPORATION, NYNEX MATERIEL ENTERPRISES COMPANY, and NEW YORK TELEPHONE COMPANY,

Petitioners,

v.

DISCON INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondent's Brief in Opposition ("Br. Opp.") avoids the critical question whether a two-firm vertical relationship can be characterized as a "group boycott" within the meaning of *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Indeed, except in its description of the decision of the court below (*see* Br. Opp. 7-8), respondent's brief does not even cite *Klor's* or mention the word "boycott." Similarly, respondent ignores the serious confusion which the holding of the court below, if unreversed, will introduce into the law of antitrust.

Instead, respondent tries to distinguish on irrelevant factual grounds the decisions of this Court and nine Courts of Appeals which hold that a vertical agreement is not a boycott, and argues that the decision below could have rested on alternative grounds, which have no support in precedent and

which were not accepted by the court below.

Particularly in light of the fact that respondent has not tried to defend the aberrant boycott holding of the court below, the Court should grant certiorari and summarily reverse the judgment below on the ground that it is contrary to *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988). In the alternative, the Court should grant certiorari and schedule briefing and argument.

I. The Factual Distinctions Urged by Respondent Do Not Eliminate the Conflict Between the Decision Below and the Contrary Holdings of This Court and Nine Courts of Appeals

In *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 730-31 & n.4, 734 & n.5 (1988), this Court held that the group boycott rule of *Klor's* applies only to horizontal agreements among competing firms (*see* Pet. 10-11). Respondent tries to distinguish *Business Electronics* on its facts by arguing that the defendant in that case had no market power (Br. Opp. 9-10). This attempted factual distinction cannot eradicate the direct conflict between the holding of this Court in *Business Electronics* that a group boycott must be a horizontal agreement, and the holding of the court below that a two-firm vertical agreement may be a group boycott (Pet. 11a-12a). In light of this direct conflict, this Court should grant certiorari to reverse the judgment below.

Respondent also tries to distinguish on their facts the decisions of the nine Courts of Appeals which are in conflict with the decision below (Br. Opp. 13-14). Again, asserted factual distinctions cannot do away with the direct conflict between the decision below and the holdings of nine other Courts of Appeals that a group boycott must be a horizontal agreement (*see* Pet. 10 n.4, summarizing and quoting the holdings of the nine Courts of Appeals).

Respondent argues that the facts it alleges support its conspiracy to monopolize claim (Br. Opp. 14-15). But respondent cites no case which has held that a buyer's choice of one supplier over another may be a conspiracy to monopolize. The holdings of this Court and other courts are to the contrary (*see* Pet. 14-16 & n.8).

II. The Alternative Theories Argued by Respondent, Which Were Not Accepted by the Court of Appeals, Cannot Support the Judgment Below

Instead of trying to defend the group boycott theory adopted by the court below, respondent tries to support the judgment below by advancing two alternative rationales, neither of which has any support in precedent, and neither of which was accepted by the court below.[1]

First, respondent argues that it is a *per se* violation of Sherman Act § 1 for a regulated monopolist to buy from a single supplier (Br. Opp. 11-13). There is no precedent which supports this remarkable proposition. Respondent cites (Br. Opp. 11-12) three cases dealing with purchases by the old Bell System from its own affiliates, and a suggestion in the original Areeda-Turner treatise that "monopolization of an unregulated supply stage by a regulated monopoly" should be "presumptively unlawful." 3 Phillip E. Areeda & Donald F.

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1. In another apparent attempt to avoid the group boycott issue, respondent argues that the court below held that there was a violation of Sherman Act § 1 under the rule of reason and, separately, a possible *per se* violation under *Klor's* (Br. Opp. 7 & n.3). This is incorrect. What the court below actually held was that there was a "two-firm group boycott" in this case, which might ultimately be judged under the *per se* rule or under the rule of reason (*see* Pet. 13a n.6). The Court of Appeals did not hold that there was a claim under the rule of reason separate and apart from its erroneous "two-firm group boycott" holding.

Turner, *Antitrust Law* ¶726e, at 218 (1978).[2] All of these citations, however, deal with a situation in which a regulated monopoly has integrated backward *through ownership* into a supply market. No such situation is involved here, because there is no ownership relation between AT&T Technologies and the NYNEX companies (*see* Pet. 4a). Absent such an ownership relation, no case has held that purchases by a regulated monopoly from a single supplier constitute an antitrust violation.

In a related vein, respondent suggests that a regulated company violates the antitrust laws when it overpays for goods or services (Br. Opp. 2-3, 6-7, 12-13). Again, this suggestion is unsupported by authority. The purpose of the antitrust laws is to protect competition, *e.g.*, *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88 (1977), not to serve as a price control law, a lowest-responsible-bidder statute, or a substitute for public utility regulation.[3] *See, e.g., Ehredt Underground, Inc.* v. *Commonwealth Edison Co.*, 90 F.3d 238, 240 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 685 (1997); *Sitkin Smelting & Ref. Co.* v. *FMC Corp.*, 575 F.2d 440, 448 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978).

Second, respondent argues that MECo should be recognized as a separate entity for antitrust purposes from its commonly-owned affiliates, NYNEX and NYT (Br. Opp. 15-17). The court below held to the contrary (Pet. 8a-10a), and this holding was required by *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 771 (1984), which held that

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2. This suggestion is not carried forward in the revised volume, 3A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶787b, at 282-83 (1996).

3. Indeed, as respondent admits (Br. Opp. 2-3, 6-7), there has been active scrutiny by regulatory commissions of alleged overpayments by the NYNEX companies.

companies under common ownership must be regarded as a single entity for antitrust purposes.

Thus respondent's alternative arguments are unavailing to avoid the questions presented by the petition herein, in particular the question whether a two-firm vertical agreement can be a "group boycott" within the meaning of *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). As described in the *amicus* briefs of The Association of the Bar of the City of New York and the Consumer Electronics Manufacturers Association, this question is one of broad public importance. Certiorari should be granted to correct the holding of the court below.

CONCLUSION

For the reasons set forth above and in the Petition for a Writ of Certiorari, the Court should grant a writ of certiorari, and should summarily reverse the judgment of the United States Court of Appeals for the Second Circuit on the ground that it is contrary to *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988). In the alternative, the Court should grant a writ of certiorari and set the case down for briefing and argument.

Dated: May 14, 1997

Respectfully submitted,

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